



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1

[FAR Case 2022-002; Docket No. 2022-0002; Sequence No. 1]

RIN 9000-AO39

**Federal Acquisition Regulation: Exemption of Certain
Contracts from the Periodic Inflation Adjustments to the
Acquisition-Related Thresholds**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that provides a statutory exception to the periodic inflation adjustments of acquisition-related thresholds for certain bond requirements.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2022-002 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2022-002". Select the link "Comment Now" that corresponds with "FAR Case 2022-002". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2022-002" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2022-002" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Ryba, Procurement Analyst, at 314-586-1280 or by email at marissa.ryba@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAR Case 2022-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR at section 1.109 to implement section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81), which provides a statutory exception to the periodic inflation adjustments of acquisition-related thresholds under 41 U.S.C. 1908.

A. What is an acquisition-related threshold?

41 U.S.C. 1908 is applicable to "a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency, as the [Federal Acquisition Regulatory] Council determines."

B. What acquisition-related thresholds are not subject to escalation adjustment?

41 U.S.C. 1908 does not permit escalation of acquisition-related thresholds established by the Construction Wage Rate Requirements statute (Davis Bacon Act), the Service Contract Labor Standards statute, or the United States Trade Representative pursuant to the authority of the Trade Agreements Act of 1979.

C. Revisions to 41 U.S.C. 1908

Section 861 of the NDAA for FY 2022 modifies 41 U.S.C. 1908(b)(2) to add performance and payment bond requirements for construction in 40 U.S.C. chapter 31 to the already

established list of acquisition-related thresholds that are not subject to escalation. The list appears in the FAR at 1.109(c).

40 U.S.C chapter 31, subchapter III, Bonds (formerly known as the Miller Act) requires certain performance and payment bonds for construction contracts. Sections 3131 through 3134 are the subject of the changes required by section 861.

- 40 U.S.C. 3131 requires performance and payment bonds for any construction contract exceeding \$100,000, unless otherwise waived.
- 40 U.S.C. 3132 requires alternatives to payment bonds as payment protections for certain types of construction contracts. For construction contracts greater than \$25,000, but not greater than \$100,000, the contracting officer must select one or more payment protections.
- 40 U.S.C. 3133 requires agencies to provide a certified copy of the payment bonds referenced in section 3131 to any person (e.g., subcontractor) who has not been paid or is being sued on the bond.
- 40 U.S.C. 3134 provides waivers from the subchapter for certain contracts issued by the Military Departments, Department of Transportation, and the National Oceanic and Atmospheric Administration.

The FAR threshold for performance and payment bonds at 28.102 is currently \$150,000 as a result of one escalation adjustment in accordance with FAR 1.109. FAR Case 2008-024, published on August 30, 2010, at 75 FR 53129, raised the threshold by \$50,000 from the \$100,000 reflected in 40 U.S.C. 3131. The threshold was added to 52.228-11, Individual Surety - Pledge of Assets, after the most recent escalation, by FAR case 2017-003, published on January 14, 2021, at 86 FR 3682.

The FAR threshold for alternatives to payment bonds at 28.102 is currently \$35,000, as a result of two escalation adjustments in accordance with FAR 1.109. FAR Case 2004-033, published on September 28, 2006, at 71 FR 57363 and 2014-022 published on July 2, 2015, at 80 FR 38293, each raised the threshold by \$5,000 from the \$25,000 reflected at 40 U.S.C. 3132.

II. Discussion and Analysis

The proposed rule adds the statutory exception provided by section 861 to the list of acquisition-related thresholds that are not subject to escalation under 41 U.S.C. 1908 at FAR 1.109(c). Section 1908 does not permit the escalation of acquisition-related thresholds established by the following:

- 40 U.S.C. 31, subchapter IV, Wage Rate Requirements (Construction).
- 41 U.S.C. 67, Service Contract Labor Standards.

- The United States Trade Representative under the Trade Agreements Act.

The rule proposes to restructure FAR 1.109(c), by consolidating the citation for 40 U.S.C. chapter 31, subchapter III, Bonds, with the existing citation for subchapter IV, Wage Rate Requirements (Construction). Since section 861 requires the thresholds to remain at the current escalated values, no other changes are required for implementation.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create new solicitation provisions or contract clauses or revise the text of any existing provisions or clauses. The rule does not change any current requirements in the provisions or clauses but does prevent future periodic inflation adjustments to an acquisition-related threshold.

IV. Expected Impact of the Rule

This rule is not expected to have a significant impact on the Government or industry because this rule maintains acquisition-related thresholds that have been in the FAR for several years without significant change.

The FAR threshold for performance and payment bonds at 28.102 had one escalation adjustment in 2010, which raised

the threshold by \$50,000 from \$100,000 and has since remained unchanged. The FAR threshold for alternatives to payment bonds at 28.102 is currently \$35,000; it was escalated twice, one in 2006 and again in 2015. Each adjustment raised the threshold by \$5,000 starting from \$25,000. Since the second adjustment, this threshold has also remained unchanged.

Because the acquisition-related thresholds under 28.102 have remained mostly unchanged, there is little expectation for future increases or changes that would affect Government and industry. There is also no expected cost impact of this rule since the acquisition-related thresholds will remain the same. There may be some benefit of consistency to the public by ensuring that the thresholds remain the same.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not

subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612, because the rule maintains the status quo. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81) that provides a statutory exception to the periodic inflation adjustments of acquisition-related thresholds for certain bond requirements.

The objective of the proposed rule is to retain the current dollar thresholds for performance and payments bonds as well as the threshold for alternatives to such bonds until changed by statute. The legal basis for the rule is Section 861 of the NDAA for FY 2022 (Pub. L. 117-81).

The proposed rule will apply to small entities performing construction services for the Government; however,

the impact is expected to be de minimis. Contract actions with a value between \$35,000 and \$150,000 will still require an alternative to payment bonds for payment protection, and those with a value exceeding \$150,000 will still require performance and payment bonds. The rule makes permanent the thresholds that have been in place for several years, resulting in no changes for any entity performing construction services.

Data obtained from the Federal Procurement Data System (FPDS) for FY 2019, 2020, and 2021 indicates that an average of 678 unique small entities received an estimated 1,219 awards annually that require alternatives to payment bonds. FPDS data also indicates that an average of 1,340 unique small entities received an estimated 2,706 awards that are subject to performance and payment bonds annually. Approximately 2,018 (678 + 1,340) unique small entities will continue to comply with current bond requirements as a result of this proposed rule.

The proposed rule does not include additional reporting or record keeping requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule to accomplish the desired objective of the statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2022-002), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C 3501-3521) applies to the information collection described in this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0045, Bid Guarantees, Performance and Payment Bonds, and Alternative Payment Protection.

List of Subjects in 48 CFR Part 1

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 1 as set forth below:

PART 1 - FEDERAL ACQUISITION REGULATIONS SYSTEM

1. The authority citation for 48 CFR part 1 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 1.109 by revising paragraph (c)(1) to read as follows:

1.109 Statutory acquisition-related dollar thresholds - adjustment for inflation.

* * * * *

(c) * * *

(1) 40 U.S.C. chapter 31-

(i) Subchapter III, Bonds; and

(ii) Subchapter IV, Wage Rate Requirements

(Construction);

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